Neutral Citation Number: [2020] EWHC 157 (QB)

Case No: QB-2019-003933

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 January 2020

Before :

CLIVE SHELDON QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

SYED TAHIR HUSSAIN	**Applicant**
- and -	
(1) MEDICAL DEFENCE UNION	
(2) MDU SERVICES LIMITED	**Respondents**

- -
- -

Luka Krsljanin (instructed by **Clyde & Co**) for the **Applicant**
Emma Corkill (instructed by **Fladgate**) for the **Respondents**

Hearing date: January 15th 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

CLIVE SHELDON QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Clive Sheldon QC, sitting as a Deputy Judge of the High Court :

1. This is an application for pre-action disclosure brought by Syed Tahir Hussain against (1) Medical Defence Union Limited and (2) MDU Services Limited, pursuant to CPR 31.16. Mr. Hussain is a general surgeon, who entered into a contract with the Medical Defence Union Limited (which I will refer to as "the MDU").

Background

2. The MDU operates as a mutual discretionary indemnifier of medical and dental professionals. MDU Services Limited is authorised and regulated by the Financial Conduct Authority and is an agent for the MDU.

3. Legal proceedings have been brought against Mr. Hussain, alleging that he performed negligent surgery on a patient (who has been referred to as WM) in December 2012, when Mr. Hussain was working in private practice. The MDU initially assisted Mr. Hussain in the defence of that claim but assistance was withdrawn on December 28th 2017.

4. Mr. Hussain requested the MDU to reconsider this decision. The earlier decision was upheld. In a letter dated March 6th 2018, the Professional Services Director of MDU Services Limited wrote to Mr. Hussain to say:

> "MDU subscriptions for private surgical practice are based on a member's level of income from the work being indemnified during a membership year. An under-declaration of income can lead to an insufficient subscription being paid which can be taken into account when determining the extent of assistance to be provided to a member in respect of matters arising from that membership year (as outlined in our Member Guide).
>
> You confirmed in writing in May 2014, in response to a direct enquiry from our claims handling team, that the level of non-indemnified income that your subscription was based upon (namely 'up to £15,000' in the membership year when the date of incident occurred) was correct.
>
> You confirmed this again on the telephone in July 2017.
>
> You subsequently provided historical income data from your accountants which showed that you had significantly under-estimated your income for the year in question and subsequent years. You also confirmed at that time that work undertaken for the Hernia Centre was indemnified separately and excluded income from that work from the income figures supplied.
>
> You then, in January 2018, confirmed that your understanding had been incorrect and that you were not indemnified separately for your Hernia Centre work.

> In any event, you then applied to retrospectively increase your declared earnings from the 1st October 2009 to the 30th September 2017 – a request that was referred to the MDU Board of Management for consideration but was not agreed.
>
> As this meant you had not paid the correct subscription for the membership year in which the claimant was treated, despite having previously confirmed to us at the outset of the case that you had, the extent of ongoing assistance was referred to the MDU Board for consideration. As you are aware, the Board determined that you would not be assisted further with the case."

Letter before action

5. On June 4th 2019, solicitors acting on behalf of Mr. Hussain sent a letter before action. The letter before action ran to 25 pages. It set out in some detail a number of different potential claims that Mr. Hussain may have. Whilst accepting that there was no contract of insurance with MDU, it was asserted that there was a contractual relationship with MDU and that MDU had breached its implied duty to exercise its contractual discretion in good faith, and not arbitrarily and capriciously. Reference was also made, among other things, to a potential claim under the Unfair Contract Terms Act 1977, as well as to a claim for an estoppel. At paragraph 4.42 of the letter before action it was stated that:

> "In the absence of compelling evidence to the contrary, it objectively appears and will so appear to the Court, that the MDU chose to withdraw assistance, either due (i) to the quantum of the Claim [brought by WM], and/or (ii) Mr. Hussain ceasing to be a Member."

6. In the letter before action, Mr. Hussain's solicitors made a request for documents:

> "(a) Notes/documents/correspondence clarifying what prompted the MDU Underwriting Department's accounting queries in late 2017;
>
> (b) Board minutes/notes/documents (in accordance with Section 76 of the Articles) relating to declinature decision of late 2017, including:
>
> (i) Details of quorum and majority formed in accordance with Sections 65 & 66 of the Articles; and
>
> (ii) Details of the recommendation(s) of the Standing Committee given to the Board.
>
> (c) Notes/documents/correspondence relating to the under-declaration, including:
>
> (i) the years in which the income was believed to be under-declared;

> (ii) the amount of the under-declaration in each year believed to be under-declared; and
>
> (iii) the shortfall in membership subscription for each year believed to be under-declared.
>
> (d) Transcript and/or audio file(s) of July 2017 phone call with Mr Hussain …
>
> (e) Details of all indemnity assistance decisions in the last decade following a member's under-declaration of income, clarifying the circumstances in:
>
> (i) Those that resulted in assistance for the Member being denied entirely;
>
> (ii) Those that resulted in conditions being placed on assistance for the Member; and
>
> (iii) Those that resulted in no conditions being placed, and indemnity assistance continuing as normal;
>
> (f) Copies of the Guide(s) and Articles in force in 2012-2014;
>
> (g) Details as requested at paragraph 4.31 above [presumably a reference to paragraph 4.30 which asked for details of (i) how the declinature decision was reached; and (ii) how the same was a fair process and satisfied the common law requirements for contractual discretion and relational contracts]."

7. Mr. Hussain's solicitors also noted that 'Should the above documents not be provided, we will submit a formal Subject Access Request under the GDPR [General Data Protection Regulation] which imposes strict guidelines. We trust this will not be necessary and look forward to receiving the requested documents.'

8. A detailed response was provided by solicitors acting for the Respondents on July 16th 2019. This addressed the various potential grounds of claim that had been referred to in the letter before action. With respect to the request for documents, this was rejected. It was stated that "Your request is not a request to review material which is necessary for you to understand our client's position."

9. Correspondence ensued between the parties. On July 19th 2019, solicitors for Mr. Hussain wrote to ask for documents that had been specifically referred to in the letter of response, as well as other matters:

> "All notes/documents/correspondence (including internal emails) relating to (i) our client's claim i.e. the decision to withdraw assistance and (ii) which led to the MDU Underwriting Department's accounting query of 17 July 2017 . . .
>
> All notes/documents/correspondence (including internal emails) relating to the private practice claim notification . ..

All notes/documents/correspondence (including internal emails) relating to the under-declaration, including:

(i) the years in which the income was believed to be under-declared;

(ii) the amount of the under-declaration in each year believed to be under-declared; and the shortfall in membership subscription for each year believed to be under-declared.

Copies of the Guide and Articles in force in 2012-2014"

10. On July 31st 2019, solicitors for the Respondents provided a number of documents, including those that had been referred to in their response of July 16th 2019. It was also stated that "This is the extent of the documents our clients are willing to provide. The pre-action protocol does not require them to disclose any other documents. Your client has sufficient information to understand our client's position.'

11. On October 3rd 2019, solicitors for Mr. Hussain wrote to ask for some of the documents that had been referred to in the letter of response but had not been provided: minutes of the Standing Committee of the Board of Management for the meeting on November 15th 2017 where the decision was taken to recommend to the MDU Board not to continue the assistance, as well as the minutes of the board meeting on December 6th 2017; as well as the notes/documents/correspondence (including internal emails) that had been asked for previously. It was asserted that these documents are "vital in assessing how and why your client came to its decision to withdraw assistance at the time and in the manner it did". Furthermore, it was asserted these documents would (i) fall to be disclosed by way of standard disclosure; (ii) dispose fairly of the anticipated proceedings; (iii) assist the dispute to be resolved without proceedings; and (iv) save costs, mirroring the language of CPR rule 31.16.

12. On October 10th 2019, solicitors for the Respondents responded to say that "Our clients have considered your request for further documents and do not agree to disclose further documentation to you."

13. On November 4th 2019, Mr. Hussain issued an application for pre-action disclosure. Mr. Hussain has sought disclosure of:

i) The minutes of the Standing Committee of the Respondents' Board of Management for the meeting on November 15th 2017 where the decision was taken to recommend to the Respondents' Board not to continue with assistance to him;

ii) The minutes of the Respondents' Board meeting on December 6th 2017;

iii) All notes/documents/correspondence (including internal emails) (i) relating to the Respondents' decision to withdraw assistance; and (ii) which led to the MDU Underwriting Department's accounting query of July 17th 2017; and

iv) All notes/documents/correspondence (including internal emails) relating to his alleged under-declaration, including:

a) the years in which the income was believed to be under-declared;

b) the amount of the under-declaration in each year believed to be under-declared;

c) the shortfall in membership subscription for each year believed to be under-declared.

14. On December 23rd 2019, solicitors acting on behalf of the Respondents wrote to Mr. Hussain's solicitors. They contended that the application was not appropriate and amounted to "no more than a fishing expedition". Nevertheless, three further documents were disclosed:

i) The Benefits of Membership Committee (BMC) Case Summary dated November 15th 2017, endorsed in handwriting by the Chief Executive of the MDU, a member of the Chairman's Committee of the Board of Management (Chairman's Committee) dated December 2017;

ii) A redacted email of Dr. Simon Watkin recording his decision as the other member of the Chairman's Committee dated December 5th 2017: this stated "BMC decision agreed. Do not assist. (member not paying appropriate subscription at time of events. No retro in place)";

iii) The BMC Case Summary typed up to record the Chairman's Committee decision.

15. It was explained by the Respondents' solicitors that "The Case Summary is the only document which is provided for consideration by both the BMC and the Chairman's Committee. There are no Minutes taken on either of the Committee decision stages. The record of each decision is recorded on the Case Summary. You will see that the document sets out the facts and a summary of the review of both Committees."

16. The Respondents' solicitors addressed each of the categories of documents sought by Mr. Hussain. It was stated that (i) there are no minutes of the Standing Committee of the Board of Management (the BMC); (ii) there are no minutes of the Chairman's Committee; (iii) the email and documents provided comprise the documents relating to the decision to withdraw assistance; (iv) the request for documents relating to the accounting query on July 17th 2017 is irrelevant, and would not fall within CPR 31.16. For Mr. Hussain's information, however, it was said that "the request followed a second claim made by your client not relevant to this matter".

17. With respect to the request for "All notes/documents/correspondence (including internal emails) relating to his alleged under-declaration", it was stated that the "majority of documents and information sought are within the possession of your client and/or would require our clients to have full information about your client's practice accounts, which he failed and/or refused to provide before assistance was withdrawn".

18. It was further stated that from the information provided by Mr. Hussain's accountant his "under-declaration was substantial in relation to the five years for which a figure is provided". Furthermore, it was said that these figures "exclude income from the British Hernia Centre" and deduct the maximum allowable expenses of 50% in each year to

reduce the MDU subscription payable "without any vouching of or explanation for those expenses".

19. The Case Summary provided by the Respondents' solicitors contained a detailed record of the various staging posts in the proceedings brought against Mr. Hussain, as well as summaries of the correspondence with Mr. Hussain from the MDU. This included references to requests in early 2014 for Mr. Hussain to confirm that his income declaration to the MDU of £15,000 accurately reflected his "non indemnified income" (that is, income which is not indemnified elsewhere – such as by the NHS itself, or via a private practice's insurance – and for which cover is sought). The Case Summary records that the income declaration figure was confirmed by Mr. Hussain.

20. The Case Summary records that in July 2017, the MDU Underwriting Department requested details of Mr. Hussain's gross and net non-indemnified income between October 1st 2012 and September 30th 2017. Mr. Hussain is recorded to have informed the MDU Membership Department that his net non-indemnified income had been £25,000 since October 1st 2015. He was subsequently sent a retrospective application declaration form, with the accompanying observation that "Based on the information that you have provided, it is necessary for your level of membership to be upgraded with effect from" October 1st 2015. Mr. Hussain submitted the retrospectivity declaration, and is recorded as having stated that the reason for the delay in notifying the MDU of the change in non-indemnified income was because "I just forgot as I have had no complaint".

21. In September 2017, Mr. Hussain is recorded to have provided the MDU with information from his accountants. Excluding income from his NHS work and work at the British Hernia Centre, it was reported that Mr. Hussain had a gross income of £60,223 for the year ending March 31st 2012, and net income (after expenses) as £30,112; and gross income of £57,321 for the year ending March 31st 2013, and net income (after expenses) as £28,661.

22. The Case Summary records that on October 6th 2017, the MDU Underwriting Department received a request for a Letter of Good Standing from Premium Medical Protection ("PMP"): an insurer of medical professionals. Mr. Hussain is recorded as having sent an email to the MDU Membership Department on October 11th 2017 saying that he would like to change provider. On November 7th 2017, the Case Summary records Mr. Hussain being written to by an MDU Claims Handler saying that queries had been raised about his accounts relating to his cover, including the period of the incident in which the claim occurred, and stated that the matter was being referred to the Standing Committee of the MDU Board of Management to consider ongoing assistance. Mr. Hussain was invited to provide any comments that he wished to bring to the attention of the Committee. (It would appear that Mr. Hussain did not provide any comments).

23. The Case Summary sets out a "Summary of Committee discussion" about Mr. Hussain's claim. This included reference to his MDU subscription for the period of the incident and until 2017 as being £15,000 of non-indemnified income, as compared with his declared net non-indemnified income being £28,661 for the membership year ending in March 2013. It was also noted that further information had been requested from Mr. Hussain, and that Mr. Hussain had informed the MDU that he had changed

indemnifier to PMP. It was noted that "The Committee agreed that a recommendation would be made to the Board of Management that he/she be not assisted with the Claim."

24. Solicitors for Mr. Hussain responded to the letter from the Respondents' solicitors on January 3rd 2020. They asserted that the fact that the Respondents had chosen to provide further documents demonstrated that there were documents to be disclosed and that the application was necessary and remained so. It was asserted that there "remains very significant disclosure yet to be provided." The lack of minutes of the Standing Committee or the Chairman's Committee was called into question, as was the fact that the decision to withdraw assistance was confirmed in a single redacted email. With respect to the alleged under-declaration, Mr. Hussain's solicitors stated that they were seeking documents that were in the control of the Respondents, and not those which Mr. Hussain held. There was also a rebuttal to the suggestion that Mr. Hussain intended to issue proceedings whatever the contents of any disclosure. It was stated that "whilst it remains possible (if not likely) that our client will proceed with a claim against your client, our client's Letter Before Action was widely drafted and covered a number of issues and possible causes of action." It was suggested that some, if not all, of those issues/causes of action may be removed if pre-action disclosure identifies the absence of any grounds, or that any ground of claim would be doomed to fail.

<u>The arguments on behalf of Mr. Hussain</u>

25. On behalf of Mr. Hussain, Mr. Luka Krsljanin contends that the conditions for pre-action disclosure pursuant to CPR Rule 31.16 are satisfied, and that the Court should exercise its discretion to order such disclosure.

26. It was contended that (1) there may well be litigation between the parties (including MDU Services Limited for procuring a breach of contract), and that this was a case where evidence from the Respondents was needed for the case to be pleaded: Mr. Hussain needs to know about the Respondents' decision making process; what was taken into account and what was not taken into account. It was contended that the documents provided so far could not be all that the Respondents had which was relevant to the decision taken to withdraw assistance; (2) early disclosure has the real prospect of avoiding proceedings or narrowing proceedings, thereby saving costs; (3) Mr. Hussain seeks disclosure of classes of documents which are relevant and must exist, this was not a "fishing expedition"; (4) the documents sought can be produced quickly and proportionately; and (5) time was of the essence, given the ongoing clinical negligence litigation against Mr. Hussain: in those proceedings, exchange of expert reports was due on January 24th 2020, and a hearing in March 2020 would set the trial window for liability trial in the case.

27. Mr. Krsljanin urged on the Court what he described as "the human element" of this case. The position that Mr. Hussain found himself in as a result of the withdrawal of assistance by MDU had had "a great psychological effect" on Mr. Hussain and his family as he would be unable to meet the potential costs of the claim against him. Mr. Hussain had been a member of the MDU for twenty years, and yet had the ground pulled from under him when he needed it the most. It was contended that Mr. Hussain was likely to be rendered bankrupt if the claim against him succeeded. The effect of that would not only be a hardship for Mr. Hussain, but it would also mean that the clinical negligence claimant, WM, would be undercompensated for his loss if successful in his claim against Mr. Hussain.

28. Mr. Krsljanin contended that absent pre-action disclosure, Mr. Hussain could be forced to fight costly battles on two fronts: a claim against the Respondents whilst seeking to defend WM's claim, and despite lacking the financial support to fight either battle. Mr. Krsljanin contended that it is highly desirable that Mr. Hussain and the Respondents should be able to resolve the issue between them so that Mr. Hussain will know whether he is able to defend the claim brought against him by WM with the benefit of assistance from the Respondents.

29. On behalf of the Respondents, Ms. Emma Corkill accepted that the conditions for making an order for pre-action disclosure under CPR 31.16(3)(a) to (c) were satisfied as against the MDU, but contended that the Court should not exercise its discretion to make the order. There was, she said, nothing unusual about this case to justify pre-action disclosure. With respect to MDU Services Limited, she contended that they would not be an appropriate party to the litigation as the contract was between Mr. Hussain and the MDU.

30. Ms. Corkill pointed out that the Respondents had already provided sufficient information for Mr. Hussain to plead his case. Although the Respondents had not conducted a thorough disclosure exercise, the Case Summary document that had been provided was the key document. This contained the facts and reasons that were before the Board that made the decision to withdraw assistance.

31. Ms. Corkill also took issue with the suggestion that the reason for the decision to withdraw was related to Mr. Hussain's decision to change indemnifier to an insurance company. She pointed out that concerns about Mr. Hussain having under-declared his income were raised before the Respondents were aware that he may be moving providers.

32. Ms. Corkill contended that even if pre-action disclosure was provided, she could not see that this would lead to the Respondents restoring assistance to Mr. Hussain.

Decision

33. CPR Rule 31.16 provides that:

> "(3) The court may make an order under this rule only where–
>
> (a) the respondent is likely to be a party to subsequent proceedings;
>
> (b) the applicant is also likely to be a party to those proceedings;
>
> (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and
>
> (d) disclosure before proceedings have started is desirable in order to –
>
> (i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs.

(4) An order under this rule must –

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require him, when making disclosure, to specify any of those documents –

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection."

34. I am satisfied that the conditions set out at CPR Rule 31.16 (3)(a) to (c) for making an order for pre-action disclosure are satisfied as against both Respondents. I consider that

a) both Respondents are likely to be a party to subsequent proceedings. I consider that there is a serious prospect that there will be proceedings against the Respondents given what has already been said by Mr. Hussain's legal representatives in the past and at the hearing before me, and given that legal proceedings will (unless a compromise is reached) be Mr. Hussain's only prospect of restoring the assistance of the Respondents in the proceedings brought by WM or to compensate him if he is required to make payments to WM. If proceedings are to be issued, in addition to MDU, I consider that MDU Services Limited "may well" (in the words of Rix LJ in *Black v. Sumitomo Corp* [2002] 1 W.L.R. 1562 at [72]) be a party, as I consider that Mr. Hussain will want to ensure that all potentially liable parties are involved in the proceedings;

b) Mr. Hussain will obviously be a party to those proceedings; and

c) the documents that are sought fall within the documents, or classes of documents, which would be covered by standard disclosure.

35. As for whether 31.16(3)(d) is satisfied, I consider that it is. I consider that, at the very least, there is (in the language of Rix LJ in *Black* at [81]) a "real prospect" that disclosure of all the documents sought by Mr. Hussain will enable his legal representatives to focus on the essential points, narrowing or refining the grounds of claim that will be put forward. This will, in my judgment, inevitably save some costs in the proceedings, as irrelevant or extraneous matters will not need to be litigated. There is also a possibility that the Respondents will reconsider their decision in light of the materials that they discover as a result of their searches for disclosure, or conversely that Mr. Hussain will form the view that a claim against the Respondents will be pointless and not worth expending his resources on.

36. The key issue for me, therefore, is whether I should exercise my discretion to grant pre-action disclosure. In this regard, I am reminded that "by and large the concept of disclosure being ordered at other than the normal time is presented as something differing from the normal, at any rate where the parties at the pre-action stage have been

acting reasonably": per Rix LJ in *Black* at [85]. In other words, the circumstances have to be something outside of "the usual run" even once the jurisdictional threshold is met, given that the jurisdictional threshold is likely to be met in many cases: see Matthews and Malek, *Disclosure* (5th ed, 2017) at 3.40.

37. The discretion to order pre-action disclosure is not confined and will depend on the facts of the case. There are a number of important considerations for the Court to take into account:

> the nature of the injury or loss complained of; the clarity and identification of the issues raised by the complaint; the nature of the documents requested; the relevance of any protocol or pre-action inquiries; and the opportunity which the complainant has to make his case without pre-action disclosure.

(see Rix LJ in *Black* at [88]).

38. In *Black*, Rix LJ also pointed out at [95] that:

> "the more focused the complaint and the more limited the disclosure sought in that connection, the easier it is for the court to exercise its discretion in favour of pre-action disclosure, even where the complaint might seem somewhat speculative or the request might be argued to constitute a mere fishing exercise. In appropriate circumstances, where the jurisdictional thresholds have been crossed, the court might be entitled to take the view that transparency was what the interests of justice and proportionality most required. The more diffuse the allegations, however, and the wider the disclosure sought, the more sceptical the court is entitled to be about the merit of the exercise."

39. I have considered these matters, as well as the various points made by counsel for the parties.

40. In my judgment, there are a number of factors that support an exercise of discretion in Mr. Hussain's favour.

41. First, the nature of the injury or loss complained of by Mr. Hussain is straightforward: it is the loss that results from the withdrawal of assistance in defending the claim brought by WM.

42. Second, even though the letter before action sets out the basis of Mr. Hussain's claim in a variety of different ways, the nub of the complaint is that the exercise of discretion to withdraw assistance is so unfair that something must have gone wrong in the process and/or some extraneous factor must have been taken into account: see *Braganza v. BP Shipping Ltd.* [2015] UKSC 17.

43. Third, the documents that are sought are narrowly confined, and ought to be obtainable relatively easily by the Respondents.

44. Fourth, the decision to withdraw assistance has plainly caused Mr. Hussain serious difficulties, as he is having to defend a clinical negligence claim without the support of an insurer or other indemnifier.

45. Fifth, if disclosure leads to the Respondents changing their position and agreeing to support Mr. Hussain, this will remove the risk that the third party, WM, will go uncompensated if he is successful with his clinical negligence claim.

46. On the other hand, I consider that there are a number of factors which militate against making the order.

47. First, I consider that the Respondents have acted reasonably in the pre-action stage, and have provided Mr. Hussain with sufficient information and disclosure for him to plead his case. They have provided him with what are, at least ostensibly, the key documents in the case: the Case Summary followed by the Chairman’s email. These documents suggest, on their face, that the reason for the withdrawal of assistance was related to Mr. Hussain’s under-declaration of his income for the relevant period (and thereafter) by some considerable amount, and his failure to correct his under-declaration on a number of occasions when asked to confirm his income.

48. Second, the suggestion made on behalf of Mr. Hussain that the withdrawal of assistance was caused by the transfer to the different provider is wholly speculative. The documents that have already been disclosed demonstrate that the investigation into the under-declaration preceded the notification to the Respondents of Mr. Hussain’s intention to transfer to a different indemnifier. This suggests that the withdrawal of assistance was not connected to the transfer decision. Mr. Hussain is perhaps hoping that there will be a document that tells a different story and makes that connection, but he has no factual basis for expecting to find such a document.

49. Third, Mr. Hussain has at all times had other lawful means of obtaining most, if not all, of the documents that he now seeks: he could have made a subject access request under the GDPR, something which his solicitors intimated he was entitled to do in June 2019. It is unlikely that the Respondents could have charged a fee for this request, and there is no obvious reason why the request could not have been dealt with within a relatively short time frame. Although I have not heard argument on the point, I cannot think of any obvious exemptions that could have been relied upon by the Respondents to justify non-disclosure. This avenue for obtaining the documents will still be available to Mr. Hussain if the pre-action disclosure request is refused by the Court, and could provide him with access to the documents in the relatively near future.

50. Weighing up these various factors, and standing back and looking at the matter in the round, I consider that the circumstances of the present case are not sufficiently unusual to justify departure from the normal rule that disclosure should be provided at the normal time.

51. I consider that Mr. Hussain has ample material available to him either to assess the merits of his case, or to issue proceedings, and if Mr. Hussain wishes to have further information about the decision before taking the step of issuing proceedings against the Respondents, he can make a subject access request under the GDPR. This can be done quickly, and Mr. Hussain can expect to receive a response with the relevant documents well before trial of the case brought against him by WM.

52. Accordingly, I refuse this application for pre-action disclosure.

Costs

The arguments

53. The parties were provided with a copy of my draft judgment in this matter setting out my reasons for refusing the application for disclosure. They subsequently made submissions on costs.

54. Ms. Corkill applies for her clients' costs, referring to CPR 46.1 which sets out a costs regime for pre-commencement disclosure applications. It provides as follows:

> "(2) The general rule is that court will award the person against whom the order is sought that person's costs –
>
> (a) of the application; and
>
> (b) of complying with any order made on the application.
>
> (3) The Court may however make a different order, having regard to all the circumstances, including –
>
> (a) the extent to which it is reasonable for the person against whom the order was sought to oppose the applications; and
>
> (b) whether the parties to the application have complied with any pre-action protocol."

55. Ms. Corkill contends that it would defy logic if the Respondents could recover the costs where the application succeeds and they are ordered to provide disclosure, but not where it fails. Further, that the Respondents reasonably defended the application.

56. Ms. Corkill invites the Court to make an award of costs on an indemnity basis. She contends that the correspondence from Mr. Hussain's solicitors was "protracted, lengthy and unhelpful". If not, I am asked to summarily assess the costs on the standard basis. The Respondents' costs schedule comes to £37,275.84 (£31,063.20, plus VAT). Ms. Corkhill contended that (a) the application involved factual and legal complexities; (b) there were protracted exchanges between the parties throughout the course of the application; (c) the nature of the application was of particular concern to the Respondents, and explained the substantial input from the partner of the solicitors instructed by the Respondents, including a lengthy statement provided by him; (d) the various documents that were sought were wide ranging, and took time and costs to search for, review and consider.

57. Ms. Corkill also seeks to resist a submission made by Mr. Krsljanin, on behalf of Mr. Hussain, that if I make a costs order against his client then this should be deemed unenforceable until after WM's claim has been determined. Mr. Krsljanin contends that staying enforcement would be "equitable but also practical". Even if Mr. Hussain had funds to meet the order, this would make it more difficult for him to fund his defence

to the clinical negligence claim. If he is able to defeat that clam, it is more likely that he will be able to pay the Respondents' costs. Ms. Corkill contends that staying enforcement would be unduly harsh to the Respondents. It would amount to a radical departure from the ordinary costs rules. The fact that Mr. Hussain is engaged in other litigation should not justify such departure.

58. Mr. Krsljanin contends that, in fact, there should be no order as to costs on the basis that (a) the Respondents took an evasive approach in connection with the issue of the subject access requests – he says that Mr. Hussain's requests should have been treated as subject access requests; (b) the application was necessary, as without it the Case Summary documents would not have been disclosed; (c) the Respondents' approach has been disproportionate and heavy-handed; and (d) at the hearing, the Respondents conceded that the jurisdictional requirements were met, but only after substantial evidence and argument had been devoted to arguing the contrary.

59. In the alternative, Mr. Krsljanin argues that reasonable and proportionate costs only should be awarded against Mr. Hussain. On summary assessment, Mr. Krsljanin makes a number of points: (a) viewed globally, the costs claimed were unreasonable and disproportionate, and not justified by the issues in the case or the Respondents' true arguments in response to the application; (b) the hourly rate charged by the partner was disproportionate given the issues, as was the level of his involvement; (c) this was not a case in which extensive searches were conducted; (d) attendances on others have not been explained; (e) the partner's witness statement was in large part irrelevant to the issues. Mr. Krsljanin submits that the Respondents should be limited to a reasonable and proportionate sum to reflect drafting the correspondence and counsel's costs.

Decision

60. In my judgment, there is no reason to depart from the general rule at CPR 46.1(2) that the party against whom the application is sought – in this case, the Respondents – should be entitled to their costs. The application was successfully resisted, and I do not consider that the Respondents acted unreasonably in the way in which they resisted that application.

61. In this regard, I note that well before the hearing, on December 23rd 2019, the Respondents provided Mr. Hussain with what are, at least ostensibly, the key documents in the case: the Case Summary followed by the Chairman's email. This voluntary disclosure followed significant pre-application correspondence in which the Respondents had set out in some detail the background to the decision to withdraw support for Mr. Hussain in the claim being brought by WM.

62. Furthermore, I note that in their letter of December 23rd 2019, the Respondents' solicitors invited Mr. Hussain to reconsider and withdraw his application, and save the costs of proceeding further. In addition, Mr. Hussain was informed that if withdrew his application, the Respondents would not seek costs to date. This was a reasonable approach to the application.

63. I do not consider that the points made by Mr. Krsjlanin – summarised above – justify a different approach from the general rule. I do not consider that Respondents took an evasive approach in connection with the issue of the subject access requests. Repeatedly, Mr. Hussain's solicitors said that they would make a formal subject access

request if their pre-action disclosure request was not satisfied (see correspondence cited above), and yet they did not do so. It was not, in my judgment, unreasonable for the Respondents to form the view that Mr. Hussain was not making a subject access request. Indeed, when I asked Mr. Krsjlanin at the hearing why a subject access request was not made, he said that his client did not wish to obtain documents through what he called "the back door".

64. It may well be the case that without the application the Case Summary documents would not have been disclosed. However, they were disclosed, and an offer to "drop hands" was made if the application was then withdrawn. This offer was not acceded to by Mr. Hussain.

65. I do not consider that the Respondents' overall approach to this matter justifies a departure from the general rule. The fact that the Respondents conceded that the jurisdictional requirements were met at the hearing did not mean that they had acted unreasonably. The key point that still needed to be argued out, and which the Respondents succeeded on, was that of discretion.

66. In my judgment, there is no basis to make an award of indemnity costs as sought by the Respondents. Mr. Hussain's legal representatives argued the case forcefully, but their conduct was not "out of the norm" to justify such an award. I consider that costs should be awarded on the standard basis, and that they should be summarily assessed.

67. It seems to me that costs in the amount of £31,063.20 (plus VAT) for this application for pre-action disclosure are not proportionate to the matters in issue: CPR 44.3(2)(a). It was contended by Ms. Corkill, among other things, that the nature of the application was of a particular commercial concern to the Respondents, as the substance of the claim and the documents sought went to the heart of the Respondents' decision making process. Furthermore, that this justified significant input from a partner at the rate of £470 per hour. That may well be how the Respondents viewed the matter. However, given that Mr. Hussain would most probably be entitled to the very same documents under the GDPR, it seems to me that the costs incurred, including the significant partner input, do not bear a reasonable relationship to the Respondents' concerns about the documents that were being sought by Mr. Hussain.

68. Looking at the individual items, it is clear that there was considerable hands-on partner involvement in the matter. I note, for instance, that 13.40 hours of partner's time was incurred on attendance on the Respondents (£6,298); and that 5.60 hours were incurred by the partner on the Respondents' witness statement. This does not seem to me to be reasonable given the issues in the case.

69. I also note that the amount of time spent on preparing the witness statement – more than 30 hours of fee earners' time – does not seem to me to be reasonable given the issues in the case.

70. Looking at the matter in the round, I consider that 60% of the overall amount sought by the Respondents is more proportionate: that is, a figure of £18,637.92, plus VAT: a total sum of £22,365.50.

71. I am comforted that this is a more proportionate amount by seeing the costs schedule produced by Mr. Hussain (£15,228 plus VAT). That is closer to the figure that I would expect to be incurred in dealing with an application of this kind.

72. I have sympathy with Mr. Hussain and the fact that he faces litigation from WM without the assistance of an indemnifier. I also appreciate that he may face further difficulty in funding that litigation if he is also required to pay costs to the Respondent. Nevertheless, I do not consider that these factors justify a departure from the normal rule that costs should be paid within a reasonable time. The Respondents have incurred considerable costs in defending this application, and they ought to be put in the position where they can recover the amount of costs that I have ordered from Mr. Hussain within a reasonable period of time. In this regard, I am mindful of the fact that there will be many other calls on the Respondents' funds from other members who need their support and assistance. I do not accept that Mr. Hussain's particular difficulties should come before the needs of the other members.